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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RAASHAD CARTER, Defendant and Appellant.	F044327 (Super. Ct. No. 02CM7628) **O P I N I O N**

THE COURT*

APPEAL from a judgment of the Superior Court of Kings County. Peter M. Schultz, Judge.

Heather MacKay, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Stan Cross and J. Robert Jibson, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Buckley, Acting P.J., Cornell, J., and Dawson, J.

SEE DISSENTING OPINION

A jury convicted appellant, Raashad Carter, on two counts of assault with a deadly weapon by a life prisoner and by means of force likely to cause great bodily injury (counts I and II/Pen. Code, § 4500) and possession of a weapon by a prisoner (count V/Pen. Code § 4502, subd. (a)). The jury also found true a serious bodily injury enhancement (Pen. Code, § 12022.7) in counts I and II and allegations that Carter had two prior convictions within the meaning of the three strikes law (Pen. Code, § 667, subds. (b)-(i)). On November 3, 2003, the court sentenced Carter to an aggregate term of 60 years to life as follows: 27 years to life on count I, plus a three-year great bodily injury enhancement in that count, 27 years to life on count II and a three-year great bodily injury enhancement in that count, and a stayed term on count V. On appeal, Carter contends the court committed instructional error. We will affirm.

FACTS

The Prosecution Case

On January 9, 2002, at approximately 2 p.m. there was an inmate stabbing in the maximum security yard at the substance abuse treatment center at Corcoran State Prison. The inmates were then ordered to lie on the ground in a prone position while an investigation was conducted. At 3:00 p.m. the inmates were instructed to stand up, place their hands on top their heads, and form a line in front of their housing units so that they could be searched and returned to their cells. After inmates Carter, Westbrook, Johnson, and Prim lined up in front of the wrong unit, Officer Manuel Gonzales ordered them to place their hand on top of their heads and follow him to their unit. However, as the inmates began walking, Carter punched Gonzales in the face and other inmates joined in striking Gonzales with their fists and feet causing Gonzales to fall and momentarily lose consciousness. When he regained consciousness, Carter and the other inmates were still kicking him and punching him.

Meanwhile other inmates who were standing in line began attacking the other officers in the yard including Officer Frank Padilla. As Padilla wrestled with one inmate

and another inmate was hitting him from behind, Carter swung an officer's baton at Padilla, striking him in the head. Other officers then subdued Carter.

Officer Gonzales suffered a herniated disk, muscle tissue damage, spasms, bruising and soreness. Officer Padilla received a four-to-six-inch laceration on his head that required 8 to 10 stitches, 2 herniated disks, a sprained hand, and he experienced vertigo and head pain for months.

The Defense Case

Carter and three other inmates testified that Carter did not participate in the assaults.

DISCUSSION

The court charged the jury in the language of CALJIC No. 17.20 as follows:

> "It is alleged in Counts [I and II] that in the commission of a felony, the defendants personally inflicted great bodily injury on a person not an accomplice to the crime.
>
> "If you find a defendant guilty of any such crime, you must determine whether that defendant personally inflicted great bodily injury upon some person not an accomplice to the crime in the commission of that crime.
>
> " 'Great bodily injury,' as used in this instruction, means a significant or substantial physical injury. Minor, trivial or moderate injuries do not constitute great bodily injury.
>
> "When a person participates in a group beating and it is not possible to determine which assailant inflicted a particular injury, he or she may be found to have personally inflicted great bodily injury upon the victim if 1) the application of unlawful physical force upon the victim was of such a nature that, by itself, it could have caused the great bodily injury suffered by the victim; or 2) that at the time the defendant personally applied unlawful physical force to the victim, the defendant knew that other persons, as part of the same incident, had applied, were applying, or would apply unlawful physical force upon the victim and the defendant then knew, or reasonably should have known, that the cumulative effect of all the unlawful physical force would result in great bodily injury to the victim.

> "The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it to be not true. . . ."

Carter contends that this instruction allowed the jury to find the section 12022.7 enhancement true even if he did not personally inflict great bodily injury. This, according to Carter, contravenes the Supreme Court's decision in *People v. Cole* (1982) 31 Cal.3d 568 and lowered the prosecution's burden of proof. We will reject these contentions.

In *Cole,* one robber ordered a second robber to kill the victim. The second robber struck the victim with a rifle three times on the arm and once on the head causing a laceration on the victim's scalp which required 15 stitches. In finding that a section 12022.7 enhancement applied only to the robber who personally inflicted the great bodily injury on the defendant, the Supreme Court stated:

> "In our opinion, the meaning of the statutory language is clear: the enhancement applies only to a person who himself inflicts the injury. 'When statutory language is thus clear and unambiguous there is no need for construction, and courts should not indulge in it.' [Citation.] It is doubtful that the Legislature could have enacted the statue in question more tersely to express the intended limitation on the class of individuals who may be exposed to an enhanced sentence for inflicting great bodily injury. Among the several dictionary definitions of 'personally,' we find the relevant meaning clearly reflecting what the legislature intended: 'done in person without the intervention of another; direct from person to another.' [Citation.] No other expression could have more clearly and concisely expressed what we interpret to be the plain meaning of the Legislature: that the individual accused of inflicting great bodily injury must be the person who directly acted to cause the injury. The choice of the word 'personally' necessarily excludes those who may have aided or abetted the actor directly inflicting the injury." (*People v. Cole, supra,* 31 Cal.3d at p. 572.)

However, the court in *People v. Corona* (1989) 213 Cal.App.3d 589, refused to apply *Cole* in a case where the defendant participated in a group beating that resulted in the victim suffering great bodily injury. In *Corona,* victims Golden and Florko arrived at a store where a group of men, including the defendant, were congregating. While victim

Golden entered the store, the defendant and his cohorts pulled victim Florko from the truck and beat him. When the victim Golden exited the store, he ran to help Florko and was also beaten by the group. Both victims suffered great bodily injury. The defendant was convicted on two counts of assault by force likely to cause great bodily injury and an enhancement pursuant to section 12022.7 was found true as to each count.

On appeal, the defendant cited *Cole* to argue that the section 12022.7 finding could not properly be returned with respect to victim Golden because there was no evidence that he personally inflicted any particular injury. In rejecting this contention, the *Corona* court stated:

> "While *Cole* has logical application with regard to the section 12022.7's culpability of an aider and abettor who strikes no blow, it makes no sense when applied to a group pummeling. Central to *Cole* is the conclusion that the deterrent intent of section 12022.7 is served by directing its increased punishment at the actor who ultimately inflicts the injury. Applying *Cole* uncritically in the context of this case does not create a deterrent effect. Rather it would lead to the insulation of individuals who engage in group beatings. Only those whose foot could be traced to a particular kick, whose fist could be patterned to a certain blow or whose weapon could be aligned with a visible injury would be punished. The more severe the beating, the more difficult would be the tracing of culpability. Thus, while it is true the evidence fails to directly attribute any particular injury suffered by Golden to any particular blow struck by appellant, still, the blows were delivered, Corona joined that delivery and the victim suffered great bodily injury." (*People v. Corona*, *supra*, 213 Cal.3d at p. 594.)

In 1999, the group-beating portion was added to CALJIC No. 17.20 based on the holding of *Corona*. (*People v. Banuelos* (2003) 106 Cal.App.4th 1332, 1337.) Further, in *Banuelos,* the Fourth District reaffirmed its reasoning in *Corona* and upheld the addition of this portion to CALJIC No. 17.20. (*Ibid*.) We find the reasoning of *Corona*

and *Banuelos* persuasive and, in accord with these cases, reject Carter's claim of instructional error.[1]

Moreover, it is clear from the record that the jury rejected the defense evidence that Carter did not participate in the beatings of the two correctional officers. Further, the prosecution evidence established that Carter struck Officer Padilla on the head with a baton causing a laceration that required eight to ten stitches to close. In view of this, we additionally find with respect to the great bodily injury enhancement alleged in count I (the assault count involving Padilla) that any error in charging the jury with CALJIC No. 17.20 was harmless beyond a reasonable doubt. (Cf. *People v. Ortiz* (2002) 101 Cal.App.4th 410, 416.)

DISPOSITION

The judgment is affirmed.

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[1] Whether CALJIC No. 17.20 is inconsistent with *People v. Cole*, *supra*, 31 Cal.3d 568 is currently before the Supreme Court in *People v. Modiri* (2003) 112 Cal.App.4th 123, review granted December 23, 2003.

DAWSON, J.

I dissent from the majority's view that no instructional error occurred. I believe that the group-beating instruction erroneously allows for a finding of criminal liability based on principles of proximate cause, despite contrary legislative language and despite the contrary interpretation of that language given at least twice by the California Supreme Court. (*People v. Bland* (2002) 28 Cal.4th 313, 336-338; *People v. Cole* (1982) 31 Cal.3d 568. See also *People v. Sanchez* (2001) 26 Cal.4th 834, 845-846 [analytical relationship between liability based on proximate cause and liability based on acting in concert/aiding and abetting]; *People v. Rodriguez* (1999) 69 Cal.App.4th 341, 349 [interpreting *Cole* as precluding liability based on proximate causation].) I believe it is up to the Legislature or the California Supreme Court to remedy the deficiency of Penal Code section 12022.7 that arises where the person who directly and actually inflicted the great bodily injury cannot be identified or where one person did not alone cause the great bodily injury.

I agree with the majority, however, that any error in giving the instruction was harmless as to count 1, and would reverse only as to count 2.